Dated: January 04, 2006

J. Vincent Aug, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT
WESTERN DIVISION

In re EaglePicher Holdings, Inc., Debtor	Case No. 05-12601 Chapter 11 (Judge Aug) Jointly Administered
Envases Del Istmo, S.A., Plaintiff v. EaglePicher Incorporated, et al., Defendants	Adv. No. 05-1173

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on the Defendant-Debtor EagelPicher Incorporated's motion to dismiss (Doc. 14), the Armor Metal Defendants' motion to dismiss (Doc. 15), Plaintiff Envases Del Istmo's ("Endelis") memorandum in opposition (Doc. 18), the Debtor's reply (Doc. 21), and Armor's reply (Doc. 22). A hearing was held on December 15, 2005.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and

the general order of reference entered in this District.[1] This is a core proceeding under 28 U.S.C. §157(b)(2)(O).

This adversary proceeding involves a claim for breach of contract against the Debtor and a claim for restitution against the Armor Defendants.[2] The issue before the Court is whether the complaint was timely filed.

The defense of the statute of limitations may be raised in a motion to dismiss under Federal Rule of Civil Procedure 12 (b)(6) when it is apparent from the face of the complaint that the time limit for filing the action has passed. Dismissal of a complaint because it is time barred is appropriate when the statement of the claim affirmatively shows that the plaintiff can show no set of facts that would entitle him to relief. *Gibson v. American Bankers Ins. Co.*, 289 F.3d 943, 946 (6th Cir. 2002).

The following facts are set forth in Endelis' complaint. In 1999, the Debtor and Endelis entered into a contract for the design, manufacture, and installation of a high-speed pin oven to be used by Endelis in the processing of aluminum cans. In April 2000, crates containing the oven were delivered to Endelis in Panama. The parties agreed to defer installation until October 2000. Just prior to installation, Endelis learned that an almost identical oven manufactured by the Debtor for a third party in Minnesota had serious operating problems. In November 2000, the Debtor confirmed that modifications to Endelis' oven would be necessary. Thereafter, Endelis hired an independent consultant to inspect the Minnesota oven. The consultant advised Endelis that the modifications proposed by the Debtor would be unsatisfactory. On April 1, 2001, Endelis rejected and/or revoked acceptance of the oven by informing the Debtor that the oven did not conform to contract specifications, that the oven would not meet the requirements for which it was purchased, and that Endelis did not wish to keep the non-conforming oven. Endelis also demanded total reimbursement of costs and expenses of $368,623.58, including the $280,471.80 it had already paid the Debtor for the oven.

---

[1] Endelis brought this cause of action in the Hamilton County Court of Common Pleas. The case was removed to United States District Court for the Southern District of Ohio and then transferred to this Court.

[2] The contract at issue was entered into between Endelis and the Debtor. Subsequently, the Armor Defendants and the Debtor entered into a purchase agreement whereby the Armor Defendants assumed responsibility for the contract with Eldelis.

Endelis commenced the action in state court on March 31, 2005.

The Debtor contends that Endelis' breach of contract claim is barred by the four year statute of limitations, Ohio Revised Code §1302.98 (UCC 2-275)[3], which began to run upon delivery of the oven in April, 2000.[4] Endelis contends that the statute of limitations did not begin to run until April 1, 2001, when Endelis invoked its right to reject or revoke acceptance of the defective oven. If Endelis' cause of action accrued upon delivery of the oven, then the action is time barred. If Endelis' action did not accrue until its April 1, 2001 notice of rejection or revocation, then the action is not time barred.

Endelis' argument hinges on its position that it did not have a claim, for breach of warranty or otherwise, and that Endelis' claim could not have accrued, *until* Endelis invoked its right to reject or revoke the defective oven. The argument is creative but not persuasive.

First, Endelis did indeed have a claim before April 1, 2001. In fact, Endelis had a classic claim for breach of warranty of a defective good. For whatever reason, Endelis did not pursue that claim in a timely fashion.

Second, Endelis has cited no caselaw, nor did this Court find any caselaw, to support Endelis' position that the statute of limitations began to run from the date of Endelis' rejection or revocation. To the contrary, the Ohio Supreme Court has stated that revocation is not a cause of action. *Aluminum Line Products Co. v. Rolls-Royce Motors, Inc.*, 613 N.E.2d 990 (Ohio 1993). Rather, rejection and

---

[3] Ohio Revised Code §1302.98 states in pertinent part:

> (A) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . .
> (B) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when the tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

[4] Endelis acknowledges in its memorandum in opposition that a breach of warranty claim would have accrued upon delivery of the oven, on or about April 2000. *See* Doc. 18, p. 5. Therefore, the Court need not address the issue raised in the briefs as to whether the action accrued upon delivery of the oven or upon Endelis' knowledge that the oven was defective.

revocation are remedies.

Third, the UCC does not set forth a separate statute of limitations for remedies. This is because any remedy available to a buyer of defective goods, whether the remedy be rejection or revocation or otherwise, necessarily springs from the underlying breach of contract itself.[5] If it did not, then a buyer could impermissibly control the running of the statute of limitations by delaying its rejection or revocation. Such a result would create uncertainty in the marketplace and run counter to the intent of the statute of limitations. *See* Ohio Rev. Code §1302.98 (Official Comment)("The purpose of this section is to introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale . . . This article . . . selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period.").

Accordingly, we conclude that the statute of limitations began to run upon delivery of the oven in April 2000 and that the claim against the Debtor is time barred.

Further, Endelis' claim against the Armor Defendants is similarly time-barred.

The motions to dismiss are hereby GRANTED.

IT IS SO ORDERED.

Distribution list:

Stephen Lerner, Esq.
Scott Kane, Esq.
John Pinney, Esq.
Peter Saba, Esq.
U.S. Trustee

---

[5] This is apparent from paragraph 31 of Endelis' complaint: "*As a result of its failure to provide an oven that conformed to the Contract's specifications* and its failure to reimburse Endelis the amount of money paid . . . [the Debtor] has breached the Contract . . ."

# # #